SUPREME COURT, U. S.

JAN 29 1969

JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1968.

No. 930.

GUY ELLENBURG,

Petitioner,

v.

A. L. SHEPHERD, KENNETH R. ROLLINS, BOBBY GENE WELLS AND MARCUS HIGGINS,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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ADDITIONAL STATEMENT.

This is a civil action wherein the plaintiff[1] sought compensatory and punitive damages from four police officer defendants for claimed deprivation of civil rights under the provisions of 42 U.S.C., Sections 1983, 1985(3) and 1986.

The case was tried to a jury in the United States District Court for the Eastern District of Tennessee, Northeastern Division. During the trial, and upon motion of the plaintiff and the concession of plaintiff's attorney that he had no evidence of a conspiracy against the three defendant subordinate police officers, Rollins, Wells and Higgins, the action was dismissed as to them. (Tr. 150, 151.)[2]

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[1] For convenience the parties will be referred to as they were in the Trial Court. That is to say, the petitioner, Guy Ellenburg, will be referred to as the plaintiff and the respondents, A. L. Shepherd, et al., as the defendants.

[2] Citations to the transcript will be made as follows: (Tr. --).

Motion for a directed verdict in favor of the remaining defendant, Greeneville Police Chief A. L. Shepherd, was sustained to the extent of the conspiracy (42 U.S.C. 1985(3)) and neglect (42 U.S.C. 1986) features of the plaintiff's claim and his claim for punitive damages. (Tr. 181, 182, 198, 199, 305.)

The case was submitted to the jury as to the defendant, A. L. Shepherd, under 42 U.S.C. 1983, which found the issues in favor of the defendant and against the plaintiff.

At no stage of the trial did the plaintiff move for a directed verdict.

The plaintiff perfected an appeal against all four defendants to the United States Court of Appeals for the Sixth Circuit, and assigned error with respect to a number of procedural and evidentiary questions. The Court of Appeals, after hearing oral arguments, sustained the motion of the defendants, Rollins, Wells and Higgins, to dismiss the appeal as to them, and entered an order affirming the judgment of the District Court dismissing the case as to the defendant Shepherd.

ARGUMENT.

The petition fails to point out any reason that would cause this Court to take jurisdiction for the purpose of review or to call for the exercise of its power of supervision.

In his Statement of Questions presented and Statement of the Case, the plaintiff is merely repeating the extravagant charges alleged in his complaint and which he was simply unable to prove during the trial of the case below.[3]

Under circumstances where the plaintiff did not move for a directed verdict at any stage of the trial in the District Court, the jury verdict forecloses appellate review of the sufficiency of the evidence with respect to the issues submitted to the jury. The plaintiff points to no evidence (and there was none) that would have entitled him to go to the jury on the issues that were withdrawn from it on defendant's motion for a directed verdict.

Under this posture of the case the petition does not, and cannot, bring forward for review any substantial Federal question, but must be limited to the procedural and evidentiary questions therein raised. The Court of Appeals properly held that the plaintiff wholly failed to establish that prejudicial error had intervened with respect to such questions.

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[3] For example, there is absolutely no proof in the record that the material seized by the defendants was destroyed. As a matter of fact, this material which was introduced by the State during the 1963 criminal trial and which formed the basis for plaintiff's conviction under the State Obscenity Statute (T.C.A. 39-3001) which was later reversed by the Supreme Court of Tennessee upon constitutional grounds and a finding that the Obscenity Statute was unconstitutional, is still in the custody of the Tennessee Supreme Court Clerk in Knoxville, Tennessee.

The Court of Appeals properly granted the defense motion to dismiss the appeal as to the subordinate police officers, Rollins, Wells and Higgins. *Stewart v. Lincoln Douglas Hotel Corp.* (C.A. 7th, 1953), 208 F. 2d 379; *Stanford v. Utley* (C.A. 8th, 1965), 341 F. 2d 265.

CONCLUSION.

The petition wholly fails to establish that the decision of the Court of Appeals is in conflict with the decision of another Circuit, that the question presented is an important question of Federal law which has not been but should be settled by this Court, that the decision of the Court of Appeals is in conflict with applicable decisions of this Court, or that there was, at any stage of the proceedings below, such a departure from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.[4]

For these reasons, it is respectfully submitted that the petition for certiorari should be denied.

Respectfully submitted,

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Greeneville, Tennessee,
Attorney for the Respondents.

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[4] Rule 19, Rules of the Supreme Court in the United States.